BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the Circuit Court of Appeals, filed September 16, 1940 appears at 114 F. (2d) 706. The order denying petition for rehearing and redetermination appears in the transcript annexed to the record. (R. 197)

The opinion of the Board of Tax Appeals appears at R. 20-30 and is reported in 38 B. T. A. 43.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28, U. S. C. A. Section 347.

2. The judgments of REVERSAL and remand for computation of the amount of tax were entered on September 16, 1940. (R. 179-180) Petition for rehearing and redetermination was DENIED on December 11, 1940 (R. 197).

3. The nature of the case, the rulings of the Board of Tax Appeals and the Circuit Court of Appeals for the Sixth Circuit, and the reasons why a writ of certiorari should be granted are set forth in the foregoing petition.

4. The grounds upon which the writ is asked fall within the reasons set forth in Rule 38 (5) (b) of the Rules of this Honorable Court, as follows:

(a) The Circuit Court of Appeals for the Sixth Circuit rendered a decision *in conflict* with the decisions of the following Circuit Courts of Appeal upon the tax-year question; C. C. A.—3, Commissioner v. North Jersey Title Ins. Co., supra; C. C. A.—9, Brunton v. Commissioner, supra; C. C. A. 10, United States v. Utah-Idaho Sugar Co., supra; C. A. D. C., Helvering v. Nibley-Mimnaugh Lumber Co., supra; C. A. D. C., Newaygo Portland Cement Co., v. Commissioner, supra.

(b) The Circuit Court of Appeals for the Sixth Circuit decided an important question of general law (the question as to when profit has accrued) in a way *probably untenable or in conflict with the weight of authority.* (The sole authority relied upon by the court for its decision herein was the case of Lucas v. North Texas Lumber Co., supra, which involved a ten-day option agreement, whereas the instant case involved a binding sales agreement with more than 40% of the consideration paid in cash in execution of contract.)

(c) The Circuit Court of Appeals for the Sixth Circuit decided a Federal question (the question as to whether a Court of Appeals has jurisdiction to REVERSE the judgment of the BOARD of TAX APPEALS except for error assigned and upon an issue tried by the Board) *in a way probably in conflict with applicable decisions of this court,* or has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision. (See cases cited in petition).

(d) The Circuit Court of Appeals for the Sixth Circuit decided an important question of Federal law (the question whether transaction amounted to a tax-free reorganization) which has not been, but should be settled by this court. (The statement of this court contained in the case of LæTulle v. Scofield, supra, touching upon the question of whether or not that case involved a tax-free reorganization, was outside the record of that case since no error had been assigned to the contrary adjudication. Such *obiter dicta* furnished the only basis for the court's decision on this question in the case at bar.)

STATEMENT OF CASE AND QUESTIONS INVOLVED

The petition for writ of certiorari annexed hereto contains a summary statement of the case and the issues involved. In view of the nature of the case, involving as it does a large number of specific acts accomplished in the year 1931, it is considered advisable to refer the Court to the Findings of Fact and Opinion made by the Board of Tax Appeals (R. 20-30). It is vital to remember that the debenture notes delivered on January 2, 1932 bore interest from and after October 2, 1931. It is also essential to remember that from and after said October 2, 1931 said Silent Automatic Corporation had no interest in future profits or losses of said business, the said profits and losses belonging to Timken from that date.

Likewise it should be recalled that over 40% of the total consideration was paid to Silent Automatic towit, $760,000.00 on said October 2, 1931 and that on said October 2, 1931, over 70% of the stockholders of Silent Automatic, by written agreement consented to the transfer of the as-

sets of Silent Automatic to Timken (R. 20-24). On the same date Timken delivered its note in amount of $100,000.-00 to Suprenant & Co., brokers, as commission on the sale. Silent Automatic kept its books on the accrual basis and filed its 1931 income tax return on that basis (R. 27).

In addition to the foregoing and between October 2, 1931 and January 1, 1932, Timken exercised acts of supervision over the assets and personnel of Silent Automatic (R. 27).

STATUTES INVOLVED

That portion of Sec. 112 of the Revenue Act of 1928 as is material to the determination of the question of reorganization is set forth in the Findings and Opinion of the Board (R. 28).

In addition to the Revenue Act, certain statutes of the State of Michigan are material to the proper determination of this cause. We refer to the following:

The Uniform Sales Act of Michigan being Act 100 of 1913, Chapt. 178, 2 C. L. Mich. 1929—(references are to compilers sections).

Sec. 9440. Contracts to sell and sales.

(1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods

to the buyer for a consideration called the price.

* * * * * *

Sec. 9443. Statute of Frauds.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods expresses by words or conduct his assent to becoming the owner of those specific goods.

Sec. 9457. Property in specific goods passes when parties so intend.

(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Sec. 9458. Rules for ascertaining intention.

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

RULE 1.

Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract

is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Sec. 9502. ACTION FOR THE PRICE.

(1) Where under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

* * * * * *

Sec. 57 of Act 327 of P. A. Mich. 1931 (Effective September 18, 1931) provides as follows: Every corporation formed or existing under this act may sell, lease or exchange all or substantially all of its property and assets, including its good will and its corporate franchises, upon such terms and conditions and for such consideration, which may be in whole or in part shares of stock in, and/or *other securities* of, any other corporation or corporations, domestic or foreign, as its Board of Directors shall deem expedient and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of a majority of the shares issued and outstanding given at a shareholder's meeting duly called for that purpose, or *when authorized by the written consent of the holders of a majority of the shares issued and outstanding, etc.* (Italics supplied).

Act 220 of Mich. P. A. 1923.

Sec. 9770 Mich. C. L. 1929 (Blue Sky Law) provides:

> The term "security" or "securities" shall include any note, stock, treasury stock, bond, *debentures*, evidence of indebtedness * * * any transferable share, investment contract, or beneficial interest in or title to property or profits, or any other instrument commonly known as security.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in reversing the judgment and decision of the U. S. Board of Tax Appeals.

2. The Circuit Court of Appeals erred in remanding said case to the Board solely for the computation of the amount of tax liability.

3. The Circuit Court of Appeals erred in failing to remand said case to the Board of Tax Appeals for determination of the liability for tax in the year 1932.

4. The Circuit Court of Appeals erred in failing to affirm the judgment and decision of the U. S. Board of Tax Appeals for the reason that it affirmatively appeared from the Findings of Fact and Opinion of the Board that there was no liability for tax in the year 1932.

5. The Circuit Court of Appeals erred in holding in effect that the Silent Automatic Corporation *accrued* a profit in the year 1932.

6. The Circuit Court of Appeals erred in failing to hold that if the transaction of October 2, 1931 was not a tax-free reorganization, then it was a sale, fully consummated in 1931 and giving rise to profit *accrued* in that year.

7. The Circuit Court of Appeals erred in holding that the decision rendered in Lucas v. North Texas Lumber Co., *supra,* constituted any rule of law or authority for the instant case.

8. The Circuit Court of Appeals erred in holding, "but the Timken Company did not have an unconditional right to the execution of the documents transferring title until it delivered or tendered the promised debentures on January 2, 1932; nor had Silent Automatic an unconditional right to the debentures until it had delivered or tendered the bills of sale contemplated."

9. The Circuit Court of Appeals erred in assuming to exercise ORIGINAL jurisdiction over a question not previously decided by the Board of Tax Appeals and from which no error had been assigned and thereby deprived these petitioners of their day in court with right to appeal from any adverse judgment.

10. The Circuit Court of Appeals erred in failing to confine its jurisdiction to APPELLATE jurisdiction exclusively and in usurping the original jurisdiction of the U. S. Board of Tax Appeals.

11. The Circuit Court of Appeals erred in making new findings of fact or new conclusions of mixed law and fact and in rendering judgment based on such conclusions so adopted, thereby depriving petitioners of a right to trial of all original questions in the lower tribunal and thereby depriving petitioners of their right to review alleged errors of fact and law in any appellate tribunal.

ARGUMENT

1. **The Circuit Court of Appeals Has Decided A Federal Question In A Way Probably In Conflict With Applicable Decisions Of The Supreme Court—Or Has So Far Departed From The Accepted And Usual Course of Judicial Proceedings As To Call For The Exercise Of This Court's Power Of Supervision. ..(Rule 38 (5) (b).**

In the case of Helvering v. National Grocery Company, 304 U. S. 282, 38 USTC 9312, this Court stated;

> "The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon a trial de novo, in effect, (made) an independent determination of the matter which had been in issue before the Board. *The Court was without power so to do.* (Helvering v. Rankin, 295 U. S. 123, 35-1 USTC 9343 et al.) To draw inferences, to weigh the evidence and to declare the result was the function of the Board. (Hulburd v. Commissioner, 296 U. S. 300, 36-1 USTC 9011."

The Sixth Circuit Court of Appeals has violated the above rule of jurisdictional power of an appellate court. It had power to reverse and remand for determination of the question as to liability in 1932 and had power to AFFIRM on ground that there appeared no reversible error in the entire record since the findings of the Board were sufficient to affirm on the undecided issue but the Court had no power to enter an independent and original determination of that other issue, excepting through its

power to affirm. The jurisdiction of an appellate court to reverse rests on assignments of error and there were no assignments of error to the undecided question and such action by said court of appeals amounts in law to denial of petitioners day in court since they have been deprived of all right to appeal from an adverse decision of said original question.

That rule of law has been followed in many cases. In the case of General Utilities & Operating Co., v. Helvering, 296 U. S. 200, 56 S. Ct. 185, 36-1 USTC 9012, Mr. Justice McReynolds stated,

> "The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board. The Petition for Review relied wholly upon the first point, and, in the circumstances, we think the court should have considered no other."

And in Champlin v. Commissioner, C. C. A. 10, 78 F (2d) 905, at page 907, stated;

> "When this court reviews decisions of the Board of Tax Appeals, *we do not act as a trial court. Even if so requested by the Commissioner, we could not and would not have tried the alternative issue not decided by the Board.* The Board having sustained the Commissioner's first contention was never confronted with the second. When this court reversed the Board, it was confronted for the first time with the alternative issue." (Italics supplied).

And in Helvering v. Rankin, 295 U. S. 123, 79 L. Ed. 1343, Mr. Justice Brandeis stated,

> "If the Board has failed to make an essential find-

> ing and the record on review is insufficient to provide the basis for a final determination the proper proceedure is to remand the case for further proceedings before the Board. * * * And the same proceedure is appropriate even when the findings omitted by the Board might be supplied from an examination of the record."

But the fact that a Circuit Court of Appeals has no jurisdiction other than *appellate* jurisdiction and as such has power to reverse only upon assignments of error, is well known amongst the profession. It accounts for the fact that the assistant Attorney General, at the argument of the cause and in the presence of the Court, asked counsel to stipulate that the court might decide the other question. Counsel refused to so stipulate and gave as his reason the fact that it was impossible to give the Court jurisdiction by consent or stipulation. The Attorney General's request for stipulation of that character was an admission that the Court did not possess the power to decide that remaining issue without such stipulation, otherwise the request was without reason or basis.

To all of the foregoing the Circuit Court of Appeals for the Sixth Circuit stated, "We are unimpressed with this argument" and then proceeded to rationalize away the objections made to such proceedure. It cited Commissioner v. Southern Bell T. & T. Co., 6 Cir., 102 F. (2d) 397 and Washburn v. Commissioner, 8 Cir., 51 F (2d) 949. Neither of these cases involved the issue presented herein.

Here there were two major issues presented to the Board each of which was decisive of the case. Decision was entered on one of such issues and reversal of such decision necessarily called for remanding for decision on

the other. If the appellate court was right in deciding the undecided issue then petitioners were wrong in filing petition for review with the Board of Tax Appeals and should have filed same directly with said Circuit Court of Appeals. If petitioners were right in filing petition with the Board as the tribunal to make the original determination, then of course, the Circuit Court was wrong in attempting to exercise or usurp that ORIGINAL jurisdiction. In any event, the writ should issue inasmuch as it is shown that the action of the Circuit Court is in conflict with the decisions of this Court and of other Circuit Courts on the same important question of Federal law.

2. The Sixth Circuit Court Of Appeals Has Rendered A Decision In Conflict With The Decisions Of Other Circuit Courts of Appeal On The Same Matter.

The Circuit Court of Appeals specifically announced that it was "unimpressed" by the argument concerning its jurisdiction as an appellate tribunal. It is also to be seen that it was likewise unimpressed by the numerous decisions of other Circuit Courts upon the equally vital question—the question of when profit *accrues* out of such a sale transaction.

To vindicate its later action in overruling specific authorities cited by the Court, the Court began its discourse on this question as follows,

> "There are no hard and fast rules of thumb that can be used in determining, for taxation purposes, when a sale was consummated, and no single factor is controlling; the transaction must be viewed as a whole and in the light of realism and practicality."

The above paragraph of the opinion is the forerunner of all that follows. It was under the above generalization that the court finally arrived at stating "The situation is analogous in the instant case" (referring to the case of Lucas v. North Texas Lumber Co., supra. That case admittedly involved a ten-day option agreement whereas the instant case involved a binding agreement of sale with upward of 40% of the consideration paid in cash on execution of the contract and the entire balance payable with interest beginning on that same day, towit, October 2, 1931.

While the contract called for a bill of sale to be delivered on January 2, 1932 and the debentures to be delivered to Silent Automatic on the same date, *the obligation to deliver, was absolute* in both instances. Title to the property had passed on the execution of the contract and the rights and liabilities of both parties were fixed at that time. Sec. 9458 Mich. C. L. 1929 (Brief—18).

In view of the above, there was slight reason for the court to hold that the instant case is "analogous" with the Lucas case, *supra.* The Lucas case was cited and distinguished by the Circuit Courts of Appeal in four of the cases cited by the Sixth Circuit in this case. Those cases are, Commissioner v. North Jersey Title Ins. Co., 79 F (2d) 492-493, C. C. A. 3; Brunton v. Commissioner, 42 F (2d) 81, C. C. A. 9; Commissioner v. Union Pacific R. R. Co., 86 F (2d) 637, C. C. A. 2; and Case v. Commissioner, 103 F (2d) 283, C. C. A. 9.

In only one of the above cases did the court hold that a tax arose in the later year. In all the others it was held that profit had accrued in the year in which the contract was executed. The single exception was the case of Case v. Commissioner, supra and in that case it was

pointed out that there was no proof that taxpayer was on an *accrual* basis. The case was likewise distinguishable from the case at bar on numerous other grounds.

But the principle of distinction between the Lucas case, supra and the instant case is perhaps best set forth in the opinion of Thompson, J., in Commissioner v. North Jersey Title Ins. Co., supra, where it was stated,

> "Whereas no unconditional liability arose on the part of the vendee in the Lucas case, supra, until the later year, when tender of title and possession were made by the vendor, in the instant case, *the liability* of the vendee *was unconditional* in the earlier year, since nothing remained to be done except payment of the purchase price."

The distinction between the Lucas case, supra, and the case at bar was likewise amply set forth in the opinion of Dietrich, J., in speaking for the Ninth Circuit in the case of Brunton v. Commissioner, supra, where it was stated,

> "With apparent confidence appellant cites the recent decision of the Supreme Court in Lucas v. North Texas Lumber Co." * * * "The case would therefore seem to be substantially different from the one at bar. Here the *liability of the vendee for the purchase price was unconditional,* the performance of this unconditional obligation was abundantly secured, and it was created in 1921. And, furthermore, in 1921, actual possession of the property sold was delivered to the vendee, who was at the same time *vested with substantially all the rights and powers incident to ownership.*" (Italics supplied).

Of equal clarity is the distinction drawn by Manton, J., in speaking for the Second Circuit in the case of Commissioner v. Union Pac. R. Co., supra, where it was stated,

> "A closed transaction for tax purposes results from a contract of sale which is absolute and unconditional on the part of the seller to deliver to the buyer a deed upon payment of the consideration and by which the purchaser secures immediate possession and *exercises all the rights of ownership.*
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> • • • • • •
>
> In the instant case there was a contractual obligation to pay even though no notes or other evidence of debt were given. It was not an executory contract, as where the transfer of title and full payment are made conditions to the completion of the transaction. (Citing Lucas v. North Texas Lumber Co., supra.
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> • • • • • •
>
> The respondent's books were kept on an accrual basis, and the gain from the sale of the property was therefore taxable for the year when the contract was executed rather than the year when the payments were made. (Citing Helvering v. Nibley-Mimnaugh Lbr. Co., supra.)"

And lastly, in Case v. Commissioner, supra, Stephens, J., in speaking for the Ninth Circuit, stated,

> "There is nothing in the record to indicate whether the taxpayer kept his books on the cash or accrual basis. * * * (And in referring to the Lucas case, supra,) "The Supreme Court held that even though the taxpayer kept his books on an accrual

basis, the profit was not taxable in the year the contract was made, because *unconditional liability* of the vendee for the purchase price *was not created in that year.*" (Italics supplied).

The Sixth Circuit, in the case at bar, attempted to place its decision inside the distinction drawn in the above cases by stating,

> "Some of the purchase price was then paid (apparently the court was unwilling to have it appear in the opinion that $760,000 or over 40% was paid in cash) and a promissory note for broker's commission given, (a note for $100,000.00 bearing interest from October, 2, 1931 was delivered), but the Timken Company did not have an unconditional right to the execution of the documents transferring title until it delivered or tendered the promised debentures on January 2, 1932; nor had Silent Automatic an unconditional right to the debentures until it had delivered or tendered the bills of sale contemplated."

We have shown that title to the property passed to Timken on October 2, 1931. Everything was done that had to be done to pass such title and the vendee was thereafter entitled to all the burdens and benefits of ownership. Under such circumstances it is futile to talk about any future passage of title. Bills of sale are not necessary to pass title. The agreement amounted in law to a bill of sale. The agreement, approved as it was by upwards of 70% of the stockholders of the selling corporation, passed title to Timken. Timken recognized that fact when it paid the broker's commission on that same

date. It further recognized that fact when it parted with $760,000, that being upward of 40% of the total purchase price.

Nor was there anything conditional about the respective rights and liabilities of the parties after October 2, 1931. Each was legally bound to deliver papers to the other. The indebtedness of Timken was created by the agreement of October 2, 1931. The notes had to be printed and approved for issuance by the Michigan Securities Commission and were approved in the month of December 1931, but the liability to pay Silent-Automatic was specific and enforcible from October 2, 1931. Notes, after all, are only evidences of indebtedness and the agreement, which was in writing and fully stated, was in and of itself, full and complete evidence of such indebtedness and of the terms thereof.

Does anyone contend that after October 2, 1931, Silent-Automatic had any insurable interest in the assets? Without such an insurable interest, can it be possible that the passage of title was conditional upon some future event? Since the passage of title was an accomplished fact, can an agreement to deliver a bill of sale at some later period, be construed as a later delivery of title? And when a taxpayer keeps books and reports income on an accrual basis as did the Silent-Automatic Corporation in the case at bar, does income *accrue* at any time other than the year when the seller has entered into a binding sale or agreement to sell?

The Sixth Circuit held to the contrary. But in so doing it rendered a decision in conflict with all the foregoing authorities. It placed a construction upon the Lucas case, supra, in diametric conflict with the construction

placed on that case by the Second, Third and Ninth Circuits. As we have stated Case v. Commissioner, supra, is readily distinguishable on the facts and particularly on the fact that it did not appear that taxpayer was on an accrual basis.

The same identical subject-matter was involved in the above cases as is involved here. The same feature that the Sixth Circuit calls "conditional" and "executory" was called "absolute" and "closed" and "unconditional" in the foregoing cases. *The principle of the cases are in conflict,* regardless of anything that may be said regarding the "terminology" of the opinions. The "terminology" of an opinion, is after all, only an evidence of the adroitness of the Jurist writing the opinion. But it takes more than mere words to remove the conflict that inevitably must exist between a ten-day option contract and the binding contract entered into herein. Every businessman knows that an option contract does not bind the optionee to any performance whatever. Likewise every businessman knows that an agreement to sell or a sale, does bind the prospective purchaser, and surely there is very slight reason, indeed, for any judicial tribunal to confuse the two separate and distinct agreements.

But such probability of conflict continues on into other cases and authorities. The decision of the Sixth Circuit conflicts with the decision of the Tenth Circuit as set forth in the case of United States v. Utah-Idaho Sugar Company, 96 F (2d) 756, wherein Bratton, J., laid down the following rule,

> "The incurring of the right to receive and of the obligation to pay definite and fixed sums accrue items for income tax purposes where books are kept and returns made on the accrual basis."

Lastly, we come to the consideration of the probability of conflict of the decision in the instant case with the decisions rendered by C. A. D. C. in the cases of Helvering v. Nibley-Mimnaugh Lumber Co., 63 App. D. C. 181, 70 F (2d) 843; affirming 26 B. T. A. 978; and Newaygo Portland Cement Co., v. Commissioner, 64 App. D. C. 278, 77 F (2d) 536, affirming 27 B. T. A. 1097 though for different reasons than those given by the Board. The Sixth Circuit Court after citing these two cases stated,

> "The cases * * * relied upon by respondents, are not inconsistent with the conclusion we have reached."

The learned Court made no effort whatever to distinguish the Nibley-Mimnaugh case, supra, from the case at bar. An examination of the facts of that case as reported in 26 B. T. A. 978 is convincing evidence of the similarity of the facts in the instant case. Every fact relied on by the Board and the Court in determination of the tax year question is present in this case. In addition there are at least two major facts present here that were not present in the Nibley case. In this case the broker's commission on sale of property was paid by delivery of note for $100,000.00 on said October 2, 1931. The Timken-Detroit Company with the consent of Silent Automatic Corporation, changed its name to the Timken Silent Automatic Company by amendment to its articles of Incorporation filed with the Secretary of State of Michigan on December 17, 1931 (R. 54-55).

Under the rule laid down in the Nibley and Newaygo cases, supra, the "burdens and benefits of ownership" passed to the purchaser in the year 1931. To paraphrase the wording of the Board in the Nibley-Mimnaugh case, supra,

> "It would be difficult to conceive acts more clearly indicating the purchaser's understanding that it had bought the property when the contract was signed on October 2, 1931, or, at any rate, when the stockholders had, on the same date, ratified the sale by written consent."

The "burdens and benefits incident to ownership" certainly passed to Timken on the execution of the agreement. Timken's actions indicated such to be their understanding and indeed it would be very doubtful business practice for a corporation to pay out $760,000.00 in cash and $100,000.00 in a note to a broker without getting something in return for such outlay. To assert that such a concern would part with so much cash and would likewise pay the entire broker's commission, merely upon having in possession a conditional contract of future sale, or option to purchase, is to assert an inconsistency. That Timken did not do so is best evidenced by the binding agreement entered into and ratified by the stockholders, at the time of such payment, as well as by many other acts of dominion exercised by Timken from and after said October 2, 1931. The profits and losses from operations belonged to Timken from and after that date.

In view of these facts we wish to summarize by saying that we disagree with the Sixth Circuit in saying that the Newaygo and Nibley-Mimnaugh cases, supra, are not inconsistent with the conclusions reached by the Sixth Circuit. The decision rendered in this case, in view of the facts of record which were glossed over or completely neglected in the ORIGINAL finding made by the Sixth Circuit, is in direct and open conflict with the principle of the decisions rendered by the Court of Appeals of the District of Columbia in said above cases.

3. **The Circuit Court Of Appeals For The Sixth Circuit Decided An Important Question Of Federal Law (The Question Whether Transaction Amounted To A Tax-Free Reorganization) Which Has Not Been, But Should Be Decided By This Court.**

This brings up a discussion of the legal effect of the decision rendered by this court in the case of LeTulle v. Scofield, 308 U. S. 415, 60 S. Ct. 313, 84 L. Ed. 355. In that case a taxpayer had sought certiorari from that portion of a decision entered by the Fifth Circuit, which excluded certain assets from participation in what was adjudged to constitute a tax-free reorganization. The question of reorganization was not properly before the Court as shown by the fact that although this Court disapproved of the decision of the Circuit Court, the decision of the Circuit Court was affirmed by the order of this Court.

Under such circumstances, the remarks concerning the question of reorganization, could not constitute the law of the case. Indeed, the law of that case was to the exact opposite effect, since the affirmance of the Circuit Court amounted in the last analysis to approval of the basis of tax-free reorganization as the law of the case.

It is our further contention that a conflict arises between the *obiter* rendered in the LeTulle case, supra, and the law as laid down in an admittedly jurisdictional case, towit, that of Helvering v. Watts, 296 U. S. 387. In commenting on that case in his brief in the Circuit Court, Government Counsel stated, "A reorganization having been effected the Court held that the mortgage bonds of the transferror corporation were also "securities" within the meaning of the statute." It is clear that bonds

furnished a large part of the consideration received in that case and that said bonds were given the same classification as the small amount of stock transferred, in determining the question of tax-free reorganization. Bonds were not taxed as "cash or other property" and certainly must have been classed as "stock or securities".

In view of the foregoing it is clear that the question of whether or not "obligations" such as those delivered in the case at bar, furnish the basis for a tax-free reorganization, *is not a settled question.* The law of the LeTulle case is in conflict with the words of the opinion of that case. The LeTulle opinion furnished the basis for the Court's action in this case. The question should be settled in a proceeding wherein the question of reorganization is specifically before this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ or Writs of Certiorari should be granted to bring up the consolidated cases referred to herein, being numbers 8197-8198 of the Docket of the Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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